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ABATEMENT.

1. The defendant pleaded in abatement "that the plaintiff resided in the State of Georgia, and that he, the defendant, resided in the district of New Bern, and ought not to be compelled to answer the suit in Fayetteville District Court." The plaintiff replied "that one A. B. had the beneficial interest in the suit, and that he resided in Fayetteville District." The defendant demurred to the replication. Demurrer overruled. *Bell v. Bell*, 95.

2. On the abatement of a suit by the death of the plaintiff, execution for the costs ought not to be issued until a *scire facias* has issued to the representatives of the plaintiff. *Simmons v. Ratcliff*, 113.

3. A instituted suit against B, and pending the suit she (A) intermarried with C, between January and July terms, 1805, of the court. At January Term, 1806, the defendant pleaded this intermarriage in abatement, and that C had not been made a party plaintiff. To this plea the plaintiff demurred. The demurrer overruled and plea sustained. *Gerard v. Pierce*, 161.

4. Defects in warrants must be pleaded in abatement; they cannot be taken advantage of after verdict upon motion to arrest. *McCrea v. Starr*, 252.

5. An order entered of record for a *scire facias* to issue to make the representative of a deceased defendant a party to the suit will prevent an abatement of the suit; for the order being made, it is the business of the clerk to issue the *scire facias*, and if he fail to do it the plaintiff shall not be prejudiced by his neglect. *Hamilton v. Jones*, 441.

ACCESSORIES. See Indictment.

ADMINISTRATORS AND EXECUTORS.

1. Administrators and executors are not liable for costs incurred in a suit brought by their intestate or testator, and prosecuted by them after his death. Where they sue in *auter droit*, they are not liable for costs *de bonis propriis;* they are liable where they sue *in their own right*, although they name themselves administrators or executors. *Arrington v. Coleman*, 102.

2. Where they sue in *auter droit* and fail, having no assets, costs are lost, unless they give bond and security for the costs, and then the security is liable. *Hostler v. Smith*, 103.

3. An executor appeals from the judgment of the County Court and enters into bond with security. The bond is binding on him and his securities, and on a *scire facias* against the securities, founded on the appeal bond and on a judgment in the Superior Court against the executor, judgment given in favor of the plaintiff. *Ibid.*

ADMINISTRATORS AND EXECUTORS—*Continued.*

4. Whether executors and administrators, when appellants, are bound to enter into bond with security? Whether bound or not, if they enter into bond and give security, such bond is obligatory upon the parties. *Simmons v. Ratcliff*, 113.

5. An executor or administrator may assign the securities of his testator or intestate without naming himself executor or administrator. *Neil v. New Bern*, 133.

6. A pays to B, his co-executor, a sum of money belonging to their testator's estate; A and B die; C, the administrator *de bonis non* of the testator, brings suit against the representatives of A, who survived B, for an account of testator's estate; the representatives of B, who received the money, must be made parties. *Quince v. Quince*, 160.

7. A bequeathed negroes and other personal property to his wife during her life, and after her death to be sold and equally divided among his children. After her death, B converts the property to his own use. The executors of A can bring trover for this conversion. *Allen v. Watson*, 189.

8. In this case the assent of the executors inured only to the tenant for life, for before the remainder could vest in the children, a sale must take place. The executors are trustees for the purposes of this sale and of making distribution among the children. *Ibid.*

9. Act of 1715, ch. 48, barring the claims of creditors against the estates of deceased debtors. See Limitation, Statute of.

10. Proceedings to repeal letters of administration must be commenced in the court in which the letters were granted. The Superior Courts can exercise only appellate jurisdiction in such case. *Ledbetter v. Lofton*, 224.

11. Judgment *quando acciderint* was rendered against an administrator for £1,835 4s. 2d., to be discharged on the payment of £917 12s. 1d. Plaintiff sued out a *scire facias* suggesting assets and reciting a judgment for £917 12s. 1d.; but not reciting it as a judgment *quando*, etc. *Nul tiel record* and *no assets* were pleaded to the *sci. fa.* The court sustained the plea of *nul tiel record*, and gave judgment for the defendant. Plaintiff moved to set this judgment aside, and for leave to amend his writ of *sci. fa.* The judgment was set aside, and leave given to amend on payment of costs. *Tear v. White*, 412. See Wills, 6.

12. The distributees of an intestate's estate may bring suit for their distributive shares against the securities of an administrator, upon the administration bond, without any previous proceeding against the administrator, although he has made no settlement of his administration with the court nor filed an account current. *Williams v. Hicks*, 437.

13. Wherever an administrator establishes the plea of "fully administered," he is entitled to judgment of execution for his costs immediately against the plaintiff. *Wellborn v. Gordon*, 502.

ADMINISTRATORS AND EXECUTORS—*Continued.*

14. In a suit against an administrator a plea of judgment confessed since last continuance is bad on demurrer. *Churchill v. Comron*, 39.

AGREEMENTS.

An agreement made, for a valuable consideration, to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt when produced, and the plaintiff may maintain trover for the colt. *Fonville v. Casey*, 389.

ASSUMPSIT.

1. A witness summoned in a suit failed to attend; he was called out, his forfeiture recorded, and judgment *nisi* entered against him. The party at whose instance he was summoned promised that if he would attend at the next term and give his testimony the forfeiture should not be enforced against him. He did attend, but the forfeiture was enforced. He then brought suit to recover damages for breach of the promise. He cannot recover, because the promise is without consideration, as it was only to induce the plaintiff to do that which it was his duty to do, without reward, except such as is allowed to witnesses for their attendance. *Sweany v. Hunter*, 181.

2. *Assumpsit* will not lie to recover money promised for doing that which it was the party's duty to do without reward. *Ibid.*

3. A conveyed to B a tract of land containing 221 acres, more or less. Some years afterwards it was mutually agreed to have the lands surveyed, and if it were found to contain more than 221 acres the defendant should pay the plaintiff $10 per acre for the excess; if it fell short, plaintiff to refund to defendant at the same rate. Here are mutual promises, and one is a good consideration to support the other. *Howe v. O'Mally*, 287.

ARBITRAMENT AND AWARD.

A suit pending in chancery is, "by consent of parties," referred to five persons, whose report is to be binding between the parties. The referees make a report, and exceptions are filed to it, charging errors and mistakes in liquidating the accounts. The suit then abates by the death of the complainant. An action on the case was brought to recover the sum reported by the referees to be due. The record of this suit and the proceedings therein are not evidence of the debt. The reference being matter of record, the award is not binding until confirmed by the court. *Parker v. Parker*, 295.

ATTACHMENT.

1. Money paid into the office upon an execution cannot be attached in the hands of the clerk at the instance of a creditor of the plaintiff in execution. *Overton v. Hill*, 47.

ATTACHMENT—*Continued.*

2. A person summoned as a garnishee may avail himself of any defense which he could make were he sued by his creditor. A, summoned as a garnishee in a suit between B and C, declared that he had given his bond to C for £870; that the debt really due at the time was only £801 15s. and that the bond was given upon an usurious consideration, and therefore void. B urged A to make some contract with C for taking up this bond, assuring him that he might have confidence in C's integrity, and that if he would make such contract, C would certainly pay to him (B) the debt which he owed to him; and A believed from B's representations that if he made this contract he would not be called upon by B as a garnishee. A agreed by a day certain to take up his bond and make payment to C, upon his deducting 12½ per cent from the amount thereof. After this contract was made, but before the day of payment agreed on, B sued out an attachment against C, and A was summoned as garnishee. Notwithstanding this summons, A complied with his contract with C and paid the money on the day. On this garnishment no judgment of condemnation will be entered, and the garnishee shall be discharged. *Russell v. Hinton*, 468.

APPEALS.

1. The judgment of the County Court not being lessened in the Superior Court, bears 10 per cent interest up to the time of rendering judgment in the Superior Court. *Mumford v. Hodges*, 131.

2. An appeal bond cannot be legally executed after the rise of the County Court, nor will the appeal be sustained unless the bond be executed in the County Court. The Superior Court cannot take a bond to sustain an appeal. *Newman v. Newman*, 178.

3. The statute does not entitle the State to an appeal in a criminal prosecution upon a verdict of acquittal. *S. v. Jones*, 257.

4. Appellant bound to give two securities, and one only being given, appeal dismissed. *Jones v. Sykes*, 281.

5. A sued B in the County Court and recovered a judgment, from which B appealed to the Superior Court, and gave bond, with C and D his securities for the appeal. In the Superior Court A was nonsuited, and at the same term the nonsuit was set aside by the consent of B, who at the next term confessed judgment; and at the same term judgment was entered up against the securities for the appeal. Execution issued and the securities moved to set aside the execution as to them because B had set aside the nonsuit without their consent. Motion disallowed, for the securities have no control over the proceedings between the plaintiff and defendant, and are bound by all the rightful acts of the defendant in the course of those proceedings. *McGimpse v. Vail*, 408.

BARON AND FEME.

A gave a negro man to his niece B, and agreed to keep the slave at his own expense during his life. Before A's death B in-

BARON AND FEME—*Continued.*

termarried with C, who, after A's death, brought an action of detinue for the slave in his own name. The possession of the slave having vested in B by the gift, and A having held the slave during his life for the use of B, C can maintain the action in his own name. *Walker v. Mebane* 41.

BAIL.

1. Pending a suit, the attorney at law for the plaintiff gave to the bail of the defendant a paper-writing in which "he agreed that the plaintiff should release and discharge the bail." This is a discharge of the bail. *Hughes v. Hollingsworth*, 146.

2. Surrender of the principal by his bail at any time before final judgment upon the *scire facias* discharges the bail from the costs of the *scire facias*. *Peace v. Person*, 188.

BANKRUPT.

1. Under the bankruptcy law of the United States the arrest and imprisonment of the debtor are both necessary to constitute the act of bankruptcy, which is not complete until the time of imprisonment prescribed by law be completed. *Nelms v. Pugh*, 149.

2. The court has no authority to establish any other act as an act of bankruptcy than the one on which the commission issued. *Ibid.*

BASTARDY.

Under the act of 1741, ch. 14, sec. 10, a *married* woman can upon oath accuse a man of being the father of a child begotten of her body previous to her marriage; and the man so accused shall be adjudged the reputed father and stand charged with the maintenance of such child, as the County Court shall direct. *Wilkie v. West*, 319.

CARRIER.

1. A, being the owner of a vessel lately repaired and put in complete order, as was supposed, took on board for freight 270 bushels of corn. The rudder was broken by the sea, the vessel wrecked and the corn lost. The rudder presented an external appearance of soundness, but was internally rotten, and that fact not known to A. He is liable for the loss of the corn. *Backhouse v. Sneed*, 173.

2. A carrier is liable for all losses except such as happen by the act of God or the enemies of the State; and this, though the charge of negligence stated in the declaration be expressly negatived. *Ibid.*

3. The principle of this liability is the public employment which carriers exercise, so that persons induced to confide in them in the course of business may receive all possible security. *Ibid.*

4. Freighters for hire upon navigable rivers are to be considered as common carriers and subject to their liabilities. *Williams v. Branson*, 417.

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CARRIER—*Continued.*

5. The words of a bill of lading, "dangers of the river only excepted," signify the natural accidents incident to that navigation, not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment. *Ibid.*

CAVEAT.

Upon the trial of a *caveat*, the only question is, who has the best equitable right to procure a grant for the lands? *Person v. Davey*, 115.

CERTIORARI. See Practice.

1. Affidavits may be read to support the affidavit on which the writ of *certiorari* was granted, as well as to contradict that of the defendant to the writ; and depositions taken in a suit then pending between the same parties may be read upon a motion to dismiss the *certiorari*. *Ledbetter v. Lofton*, 184.

2. The plaintiff in a writ of *certiorari* is entitled to file affidavits, after those of the defendant have been filed, either to confirm those upon which the writ was obtained or to disprove those filed by the defendant; and he is entitled to a continuance of the cause to procure such affidavits, if he make it appear to the satisfaction of the court that he cannot procure them at the term at which the defendant's affidavits are filed. *Vervell v. Trexler*, 438.

CHOSE IN ACTION.

A deed for lands in the actual adverse possession of another person is totally void. *Gibson v. Shearer*, 114.

CLERGY, BENEFIT OF.

No reason exists at this day why females shall not be entitled to the benefit of clergy, as well as males. *S. v. Gray*, 147.

CONTRACTS.

A horse-racing contract must be in writing, and parol evidence is not admissible to contradict it. *Critcher v. Pannell*, 32.

CORPORATIONS. See General Assembly.

COSTS, SECURITY FOR, RULES FOR.

1. The sum levied upon an execution, being insufficient to discharge the plaintiff's judgment, must be applied solely to his use; and the costs of the defendant's witnesses are not to be paid out of the sum thus levied. *Pearson v. Haden*, 140.

2. The solicitor for the State is entitled to a fee in case of a *scire facias* against a delinquent juror, in all cases where costs are given against such juror. *S. v. Whitsenhunt*, 287. See Equity; See Wills, 6.

3. Under the act of 1787, ch. 19, the courts have the power to make rules for the plaintiff to give further security from

COSTS, SECURITY FOR, RULES FOR—*Continued.*

time to time for the costs, and in case of failure to comply with these rules, to dismiss his suit. *Tyler v. Person*, 498.

4. Wherever an administrator establishes the plea of "fully administered," he is entitled to judgment of execution for his costs immediately against the plaintiff. *Wellborn v. Gordon*, 502.

5. Where defendants in a civil action sever on their defense, those who succeed will recover costs. *Stockstill v. Shuford*, 39.

COURT.

The number of times the verdict shall be set aside and a new trial granted is in the discretion of the trial court. *Comrs. v. James*, 40.

COVENANT.

1. In a deed of bargain and sale the words, "grant, bargain, sell," etc., do not imply a warranty of title, nor do the words of a deed describing the length of lines and boundaries, etc., and concluding with the words "containing so many acres," import a warranty of quantity. *Rickets v. Dickens*, 343.

2. The action of covenant will lie upon the words of a deed, "will warrant and defend the premises to A. B. and his heirs forever"; and this from necessity, as otherwise a vendee would be without a remedy in many cases, for the writ of *warrantia chartæ* is not in use in this State, nor are real actions in which voucher is used. *Ibid.*

3. Plea, "that the plaintiff before the commencement of the action had sold and conveyed to another in fee the lands mentioned in the deed," overruled, and demurrer to said plea sustained. *Ibid.*

4. See the same points ruled in *Powell v. Lyles*, 348.

CREDITOR AND DEBTOR.

1. The whole estate of the debtor being liable to the creditor, if owing to the removal of one or more of the legatees from the State, or any other cause, the estate of the testator in his or their hands cannot be reached by the creditor here, the other legatees within the reach of the process of the court are liable to the creditor for his whole debt, if their legacies amount to so much; and if one legatee pay more of the testator's debts than another, it is a question of contribution between him and the other legatees. *Young v. Weldon*, 177.

2. The creditor is not liable for the maintenance of his debtor in jail upon a *ca. sa.*, unless he discharge the debtor and the debtor be unable to pay for such maintenance. *Turrentine v. Murphey*, 180.

3. Previous to Laws 1800, ch. 8, a debtor imprisoned for debt was entitled to the benefit of the act for the relief of insol-

XUM

CREDITOR AND DEBTOR—*Continued.*

vent debtors, by remaining within the prison bounds (bond having been given for the keeping thereof) for the space of twenty days. *Miller v. Hunter*, 394.

4. A debtor who is ready to pay his debt when it becomes due is excused from paying interest thereon, if the creditor conceal his place of residence and the debtor knows not where to apply to make payment. *Child v. Devereux*, 398.

DEBT, ACTION OF.

Debt lies by the payee against the maker of a promissory note, expressed to be given for "value received." *Gardner v. Clark*, 283.

DEEDS, CONSTRUCTION OF.

1. A deed for lands in the actual adverse possession of another person is totally void. *Gibson v. Shearer*, 114.

2. Plaintiff having lost the bond declared on, after an appeal from the judgment of the County Court, is permitted to prove the contents thereof upon the trial in the Superior Court, and to recover judgment without amending his declaration. *King v. Bryant*, 131. See Possession.

3. Deeds executed in England for land in this State were proved before the Lord Mayor of the City of London and the probate thereof certified under the seal of the Mayoralty. They were then transmitted to this State, and arrived in the year 1771, but not registered within twelve months thereafter. They cannot be read in evidence under the act of 1715, ch. 38, as that act requires them to be registered within twelve months *after their arrival*. But the act of 1779, ch. 7, having declared "that all deeds, etc., not already registered, acknowledged or proved, shall and may within two years after the passing of this act be acknowledged by the grantor, etc., or proved by one or more of the subscribing witnesses, and tendered to the registers of the counties where such lands lie, and shall be as good and valid, etc., as if they had been acknowledged or proved and registered agreeably to the directions of any act of Assembly theretofore made," and the deeds *having been registered* within two years from the passing of the act, shall be received in evidence. And a *further probate* of the deeds is not necessary, under this act, to entitle them to registration, they having been legally proved before. *Benzien v. Lenoir*, 194.

4. The words in a deed of trust, "to pay, satisfy and detain to themselves the sum of £500, together with all costs which shall arise against them for their being security for A for several different sums of money, also being common and special bail in several suits," do not extend to securityships entered into subsequent to the execution of the deed; and parol evidence is not admissible to prove that the parties intended the deed to extend to subsequent securityships. *Miller v. Lucas*, 228.

5. A deed may be shown to have been delivered in escrow without pleading it. *Moore v. Parker*, 37.

DESCENT.

A, being seized of lands, dies intestate in 1802, leaving a brother and sister, also a widow and two children; each of the children dies intestate and without issue. The lands do not go to the mother, but to the uncle and aunt of the father. *Willsay v. Sawyer*, 493.

DEVISE.

1. A devised to B, her son, two tracts of land, "to him and his heirs forever." She then appointed C her executor, and gave him authority and power "to take upon himself the sole and whole management *and disposal* of the rents and profits of the said lands, *absolutely* and *exclusively*, inasmuch as he may manage and *dispose* of the rents and profits, of whatever kind soever, *without the restraint or constraint* of any person or persons whatever, until B should arrive at the age of twenty-one years." The rents and profits do not belong to the executor; he has a mere naked authority to manage and dispose of the profits, but to do so for the benefit of the devisee. *Blount v. Johnston*, 36.

2. A bequeathed a negro and horse to B, and declared "that if B should depart this life *without heir lawfully begotten of her body* the negro and horse should belong to C." The limitation to C is too remote. *Matthews v. Daniel*, 42.

3. A bequeathed to his son Thomas during his natural life a negro girl, and after his decease he gave the said negro and her increase "to his grandson Francis, to him and his heirs forever; and *in default of such issue*, the said negro and her increase to be equally divided amongst his brothers and sisters *then living*." The limitation over to the brothers and sisters of Francis is valid, and the words, "*in default of such issue*," mean the failure of issue at the death of Francis. The word "*then*" is here used as an adverb of time, and points to the default of issue at the death of Francis. *Moreland v. Majors*, 48.

4. Rules of construction. 1st. Such a construction ought to be put upon the words of a will as upon a fair consideration of the whole context it is evident the testator intended they should receive, unless some rule of law be thereby violated. 2d. Where personal estate is limited after a dying *without issue*, those words do not *necessarily* import a general failure of issue, although the first devise may be of an express estate tail. Nor in the case of an estate tail by implication do they necessarily signify a dying without issue living at the death of the first devisee. If, however, the construction entirely depends on those words, the limitation in both cases is too remote; but in one case as well as the other the words may be confined to a dying without issue then living, if there be anything in the will from which such an intention can be inferred. 3d. The inclination of the Court should be in favor of such a construction as will support the limitation over, if it can be done; and they should lay hold of any opportunity of referring such words to the want of issue at the time of the death. *Ibid.*, 51.

DEVISE—*Continued.*

5. Whether the Court will look to the *subject-matter* of the devise as a circumstance from which the intention may be inferred, see note in *Matthews v. Daniel*, 42.

6. A devises his estate "to his daughter B, and *if B die without having heirs, then and in that case* to the nephews and nieces of A." The limitation over to the nephews and nieces is too remote. *Bryson v. Davidson*, 143.

7. A bequeaths personal property to his five daughters, naming them, "to them and their disposal." Three of the daughters die in the lifetime of the testator. The shares of these three daughters are to be distributed among the next of kin of the testator, and do not survive to the other two daughters. *Sawyer v. Trueblood*, 190.

8. Testator directs his debts to be paid out of his personal estate; charges his real estate with the maintenance of his wife; gives £1,000 to an only daughter, and after giving other pecuniary legacies he gives the remainder of his estate to his three sisters. The personal estate is exhausted in the payment of debts: *Held*, that the legacy of £1,000 to the daughter is a charge upon the real estate. *Givins v. Givins*, 192.

9. A devised all his cash on hand, certificates, stock in trade, etc., also all his estate real, personal, or mixed, not before devised, "to his three illegitimate daughters, B, C and D, between them and the heirs of their bodies forever; but if either of the said children should die before they arrive at the age of eighteen years, or marries, then the estate of the one deceased to be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of the said children should die, before they arrive at the age of eighteen years, or marries, then the portion of the two deceased shall descend to the surviving one, and the heirs of her body forever; but if all the said daughters should die before they arrive at the age of eighteen years, or marry, and have issue thereby, then all the cash, certificates, etc., and other property aforesaid, to be equally divided between E, F, G," etc. D, one of the daughters, intermarried with J. S. and died *after* attaining the age of eighteen years, but without issue. D's estate became absolute upon her arriving at the age of eighteen years, and upon her death without issue did not vest in her surviving sisters. Cross-remainders between the daughters are not to be raised by implication in this case; and the Court will construe the word *or* as *and* to effectuate the intention of the testator, his intention being, that if either of the daughters should die under the age of eighteen years, unmarried and without issue, that her estate should go over to her surviving sisters; but if either of them should attain the age of eighteen years, or should marry and have issue, that her estate, before contingent, should become absolute upon the happening of any one of these events. *Alston v. Branch*, 356.

10. A devises to his grandson B a tract of land, "and in case B die before he arrives at lawful age, or leaving no issue,

DEVISE—*Continued.*

then to his grandson C." B arrived at full age, but died without issue. B took a contingent fee under this devise, which became absolute upon the arrival of B to full age; and the Court will construe the word *or* as *and* to effectuate the intention of the testator, it being his intention that the estate should become absolute in B upon B's having issue or arriving at full age. *Dickenson v. Jordan*, 380.

11. A devised all the residue of his estate to be "*equally divided between* B, C, D, E's heirs and F." The distribution is to be made *per capita*, and each of E's children take an equal share with B and the other legatees. *Whitehurst v. Pritchard*, 383.

12. A devised his manor plantation to his son B, in trust to apply and pay over the rents and profits to another son, C, during his life, and after the death of C he devised the plantation to B in fee simple. In the year 1790 B conveyed the plantation to C in fee, with a proviso "that if C should die without a child or children the plantation should revert to B and his heirs." B died in 1794, intestate, leaving two children, D, a son, and E, a daughter. At the time of his death D, his son, was heir at law; in 1795 the Legislature declared that sisters should be admitted to inherit lands equally with the brothers, to hold with the brothers as tenants in common. In 1798 C died without leaving any child; and a question arose whether D, who was the heir of his father at the time of the descent, or D and E, who were the heirs at the time the reversionary interest of the father fell into possession, were entitled to the rents and profits of the plantation: *Held*, that E was entitled equally with D, for whoever claims a fee simple by descent from one who was first purchaser of the remainder or reversion expectant on a freehold estate must make himself heir to such purchaser at the time when such remainder or reversion falls into possession. *Exum v. Davie*, 475.

13. Testator devised his lands "to be divided between his daughters, Amey and Jaca; and if either of them died before they came of age *or* married, the share of the one so dying to vest in and belong to the other." Jaca married and died before she came of age, in 1792. She had a brother, who died in her lifetime, leaving children, who were her heirs at law under the act of 1784, ch. 22, sec. 3. The lands devised to Jaca vested absolutely in her on her marriage, and upon her death descended to her heirs at law. The Court will not construe the word *or* copulatively, so as to render the happening of both events, viz., Jaca's marriage and her death under age, to be necessary to the absolute vesting of the estate in her, unless it be to carry into effect the intent of the testator; and where no intent appears rendering such a construction necessary the word *or* shall be construed disjunctively. *Lindsey v. Burfoot*, 494.

DISCRETION OF COURT.

1. The appointment of a guardian rests in the discretion of the court. *Wynne v. Always*, 38.

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DISCRETION OF COURT—*Continued.*

2. The number of times the verdict shall be set aside and a new trial granted is in the discretion of the trial court. *Comrs. v. James*, 40.

DISTRIBUTION, STATUTE OF.

A posthumous child is entitled to a distributive share under the statute of distributions. *Hill v. Moore*, 233.

DONATIO MORTIS CAUSA.

1. A, on his deathbed, directed B to go into his field to a place pointed out and get a sum of money there deposited, which in the event of A's death B was to divide among A's children. This is not a *donatio mortis causa* to A's children. *Windows v. Mitchell*, 127.

2. And B's acknowledgment of the above facts and of his having received the money is not good evidence thereof to vest the money in him as trustee for the children of A and defeat the statute of distributions. *Ibid.*

DOWER. See Equity.

EJECTMENT. See Possession; Practice.

ENLISTMENT OF SOLDIERS.

Under the act of Congress regulating the enlistment of soldiers in the Army of the United States, where the father is dead and the son is without a guardian or master, "the consent in writing" of the mother, if she be alive, is necessary to make valid the enlistment of the son, if he be a minor; and such minor, enlisted without such consent, was discharged upon a writ of *habeas corpus*. *Ex parte Mason*, 336.

EQUITY; EQUITY OF REDEMPTION.

1. Where no circumstances of surprise, accident or fraud appear to have intervened in a case to prevent a party from having a full hearing in the County Court, upon the points which form the ground of his application to the Court of Equity, and over which the County Court has equal and concurrent jurisdiction with the Court of Equity, an injunction will not be granted. *Holding v. Holding*, 9.

2. A petition for rehearing a case will lie, notwithstanding a former petition has been preferred and denied, if the justice of the case demand a rehearing. It is a matter of course to grant a rehearing, if counsel will certify in its favor; but it is not a matter of course to grant a second rehearing. The court ought to be satisfied with the reasons offered before a second rehearing be granted. *Wilcox v. Wilkinson*, 11.

3. A widow dissents from her husband's will and claims a distributive share of the crops growing on the lands devised. She files a bill in equity against the executor for an account of the crops and a distribution of them, but charges no fraud. Bill dismissed, on the ground that a court of equity has no original jurisdiction over the case. If the widow be entitled

EQUITY; EQUITY OF REDEMPTION—*Continued.*

to a distributive share of the crops growing on the lands of her husband at the time of his death, she must seek to enforce it in the way pointed out by the act of 1791, ch. 22. This is not such a matter of account as will authorize a court of equity to take cognizance of the case. *Jones v. Jones*, 96.

4. Dower having been assigned to the widow upon a petition at law, equity will not entertain a bill for the mesne profits during the detention of the dower, unless there be some equitable circumstance, such as loss of title deeds, or detention of such deeds, or a discovery is necessary. *Whithead v. Clinch*, 128.

5. Damages for the detention of the dower are to be prayed for and recovered when the dower is allotted. If defendant to a suit at law for dower die pending the suit, damages are lost and dower alone recovered. *Ibid.*

6. A bequeathed two slaves, by name, to his widow during life, and in a subsequent clause of his will he bequeathed "the negroes therein mentioned, Pat, King, etc. (naming them, but omitting the names of the two given to his widow during life), to five of his children," adding, "that the above that are not given away shall be equally divided among his said children." The negroes in the first clause are included in the second clause of the will, and after the death of the widow go to the five children. *Branch v. Branch*, 132.

7. Two of the children having died intestate before a distribution of the negroes was made, the next of kin cannot have a decree for distribution of their shares of the said negroes against the administrator *de bonis non* with the will annexed, until the representatives of the deceased children are made parties. *Ibid.*

8. The purchaser of a tract of land dies before he pays the purchase money or receives a title, and by his will devises the land to his sisters, who are aliens; his executors having been compelled to pay the purchase money, those who take the land after his death take it subject to this charge, and are bound to reimburse the purchase money to his executors. And the land being sold by an order of the County Court upon the application of the guardian, for the purpose of discharging demands against his ward's estate, the ward being made a party defendant to the bill filed for the purpose of having the purchase money reimbursed, demurs to the bill. Demurrer overruled. *Kay v. Webb*, 134.

9. This cause was heard upon bill and answer in 1787, and a decree made in favor of complainant. Two reports have been made in his favor since. On petition by defendant in 1802 a rehearing was directed on the ground that the answer denied the equity of the bill and was to be taken as true, it not being replied to. Leave to reply to the answer now, is refused on account of the distance of time and death of parties and witnesses. *Wilcox v. Maclaine*, 140. See Evidence.

EQUITY; EQUITY OF REDEMPTION—*Continued.*

10. A is indebted to B upon bonds, and in 1777 offers to pay in depreciated currency; the bonds are absent; B refuses to accept the depreciated money, but agrees that in consideration of A's having offered to pay, and the bonds being absent, no interest shall be thereafter charged until the bonds are produced and payment demanded in this State. Equity will enforce this agreement. *Singleton v. Ogden*, 157.

11. A pays to B, his coexecutor, a sum of money belonging to their testator's estate; A and B die; C, the administrator *de bonis non* of the testator, brings suit against the representatives of A, who survived B, for an account of the testator's estate; the representatives of B, who received the money, must be made parties. *Quince v. Quince*, 160.

12. If owing to the removal of one or more of the legatees of a testator from the State, or any other cause, the estate of the testator in his or their hands cannot be reached by the creditor here, the other legatees within the reach of the process of the court are liable to the creditor for his whole debt, if their legacies amounted to so much; and if one legatee pay more of the testator's debts than another, it is a question of contribution between him and the other legatees. *Young v. Weldon*, 176.

13. After the answer to an injunction bill has been filed, the bill cannot be amended before the hearing. *West v. Coke*, 191.

14. Affidavits will not be received by the court to support the allegations of an injunction bill. *Ibid.*

15. A demised a lot in Wilmington to B for five years, and in the indenture of lease covenanted that if B, at any time before the expiration of the lease, should be willing to purchase the lot, he would convey it to him upon payment being made to him of $700. Before the lease expired B elected to purchase the lot, and paid $70 of the purchase money. He failed to pay the balance before the expiration of the lease, and requested further time, which was allowed. He still failed to pay, and A tendered to him the $70, brought an ejectment and recovered judgment. B defended the suit and failed to tender the balance of the money. He then filed a bill, offering to pay the balance, and prayed that A might be decreed to receive the money, convey the lot, and be enjoined from disturbing his possession. Injunction granted, and decree made according to the prayer of the bill; for the day of payment not being expressly stipulated, and the contract of purchase in part performed, the Court will grant a reasonable time to B to complete the contract; but he must pay the costs, both at law and in equity. *Hartman v. McAlister*, 207.

16. Complainant obtained an injunction and died before the hearing of the cause. No administration being had on his estate, and defendant having put in his answer, moved that it be read and the injunction be dissolved. Motion disallowed. *Hill v. Jones*, 211.

17. To make the purchaser of a legal title a trustee for the *cestui que trust*, it is not necessary that he should have notice of

EQUITY; EQUITY OF REDEMPTION—*Continued.*

the particular cestui que trust. It is sufficient if he have notice that the person from whom he buys is but a naked trustee. He ought to inquire and search out the *cestui que trust.* *Maples v. Medlin*, 220.

18. Complainant having neglected to plead *usury* to an action at law upon his contract, and having in his bill shown to the court no reason for his neglect, and not having waived the penalty given by the statute for usury, a demurrer to his bill was sustained, and the bill dismissed. *Branton v. Dixon*, 225.

19. A gives his bond to make title to a tract of land to B, and dies intestate, leaving three sons his heirs at law, one of age, the other two infants. B dies; the administrators of A recover of the executors of B a judgment for the balance of the purchase money for the land. The executors and devisees of B file a bill praying for a specific execution of the contract as against A's heirs at law, and an injunction as against A's administrators, on the ground that part of the land was claimed by an elder title. The heirs in their answer declare their readiness to make title, and the administrators admit assets. Injunction dissolved upon defendants giving security to make title agreeably to the prayer of the bill; and the costs ordered to be paid by A's administrators out of the assets of their intestate. *Tindall v. Mounger*, 290.

20. Pending an execution against A, he conveys his property to B by a deed purporting to be absolute and for a valuable consideration; and it is agreed between A and B that when the execution shall be satisfied B shall reconvey the property to A. Equity will not enforce this agreement. No person is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention or for a fraudulent purpose. Fraudulent conveyances are binding upon the parties making them. In applying the maxim, "that he who does iniquity shall not have equity," to particular cases, it is not necessary that it should appear that the iniquity was done to the person against whom relief is sought, although it must appear to infect the particular transaction out of which an equity is attempted to be set up. *Vick v. Flowers*, 321.

21. Pending a suit against A as security for B, A, to defeat any recovery that might be made against him in said suit, conveys his property to C by an absolute deed, purporting to be for a valuable consideration; and it is agreed between A and C that C shall reconvey the property to A whenever he shall be requested. It appears upon the trial of the suit against A, that the debt claimed of him has been paid by B, for whom he was security, and judgment is rendered in favor of A; upon which he filed a bill to compel C to reconvey the property according to the agreement. Equity will not enforce this agreement, on account of its moral turpitude. *Jackson v. Marshall*, 323.

22. An equity of redemption cannot be sold by virtue of an execution at law (before 1812). *Allison v. Gregory*, 333.

EQUITY; EQUITY OF REDEMPTION—*Continued.*

23. A and B, citizens of Virginia, sold a stud-horse to C and D, citizens of this State, and made a false and fraudulent representation of his pedigree. C and D, being sued on their bond for the purchase money, and judgment being recovered, filed their bill charging the fraud and praying for an injunction. The injunction was granted, and A and B demurred to the bill, and for cause showed that it appeared from complainant's own showing they had relief at law. Demurrer overruled upon two grounds: (1) that A and B reside in another State, and that C and D ought not to be sent beyond the jurisdiction of our own courts to seek relief; (2) that it being a case of fraud, a court of equity will take cognizance of it and at once save complainant from an iniquitous recovery at law. *Hauser v. Mann*, 410.

24. A court of equity has the power to appoint the clerk and master of the court guardian to infant defendants, to appear and answer for them; and can exercise this power without the consent of the clerk and master. *Muir v. Stuart*, 440. See Evidence, 15.

ESCAPE.

A paper-writing, upon which a constable arrests a debtor and imprisons him, not running in the name of the State nor being directed to any ministerial officer, nor purporting to be signed by a justice of the peace, cannot be deemed a judicial process; and the sheriff is not guilty of an escape in permitting the debtor thus imprisoned to go at large. *Ellis v. Gee*, 445.

EVIDENCE.

1. A, as attorney in fact for B, conveyed lands to C, and afterwards he conveyed the same lands to D. Upon the trial of an issue directed by the Court of Equity, "Whether the conveyance to B was made to him upon a valuable consideration as a purchaser, before the execution of the deed to D," A is a competent witness. *Alston v. Jones*, 45.

2. The articles of a horse race being for $500, *play or pay*, parol evidence admitted to prove that by the rules of racing the money should be staked, and parol evidence cannot be admitted to show that a bond given at the same time for $500 had relation to the articles, and that the meaning of the parties was that the money should not be staked; because such evidence is expressly rejected by the act of 1800, ch. 21. *Jackson v. Anderson*, 137.

3. A, being subject to intoxication, and on that account liable to imposition, and fearing that in some unguarded moment some person might obtain from him a conveyance of his lands, agrees with B to convey the lands to him by an absolute deed, and B agrees to hold the land as a trustee for C, one of the children of A. The conveyance being executed, C and his agents remain in possession of the lands, and B does not call them to account for the rents and profits. B dies, and divises the lands to C and D, as tenants in common, C files a bill charging the above facts; D answers and denies the trust, and insists that the lands were purchased by B

EVIDENCE—*Continued.*

for a valuable consideration. Parol evidence will be admitted to prove the trust, as B did not take possession of the lands nor call on C for an account of the rents and profits. *Gay v. Hunt*, 141.

4. A, to whom testator devises permission "to live six months in his house, if she chooses," is a competent witness to prove the will as to the real estate. *Winaut v. Winaut*, 148.

5. Plaintiff offered in evidence a copy of a registered deed, offering to swear that he had not the original and knew not where it was. Defendant had given notice to plaintiff to produce the original. The court permitted the defendant to show that the original had been altered before its registration, and had been since destroyed by the approbation of the plaintiff. The copy was refused as evidence, and the plaintiff nonsuited. *Bryan v. Parsons*, 152.

6. A receives money for B and pays it to C, who says he is authorized by B to receive it. B sues A for the money; C is a competent witness to prove that B authorized him to receive the money of A. *Blackledge v. Scales*, 179. See Deeds.

7. A and B gave their joint bond to C, and D became the subscribing witness. C assigned the bond to D, who brought suit on the bond against A. He pleaded the general issue, and upon the trial the handwriting of D and also of A was proved. It was also proved that on the day on which the bond bore date A had purchased goods of C to the precise amount of the bond. This is not legal proof of the execution of the bond; and the jury having found a verdict for the plaintiff, the verdict was set aside and a nonsuit entered, upon the ground that the production of the subscribing witness to a bond is never dispensed with, except from necessity; as where he is dead, has removed, or become interested by operation of law. Here the subscribing witness has become the assignee of the bond, and the plaintiff in the cause. *Johnston v. Knight*, 293.

8. A and B sign a written contract respecting a horse race, agreeably to the act of 1800, ch. 21. B and C make a by-bet, and reduce it to writing, and therein B agrees, "if A should win the race which he had made with him that day, he agrees to pay C $1,000." A won the race, and the stakeholder was directed by B to deliver his bond for the $1,000 to C, and the bond was delivered. C sued B, and B pleaded that the bond was delivered as an escrow. Ruled, (1) that the written contract of by-bet between B and C, not referring to the written contract between A and B as to the race, there was not between B and C such a contract in writing as the act of 1800, ch. 21, sec. 2, requires; (2) that parol evidence could not be admitted to prove that the race referred to in the written contract of by-bet was the race mentioned in the written contract between A and B; (3) that the delivery of the bond to C, by the stakeholder, by the direction of B, did not preclude B from claiming the benefit of the act of 1800, and requiring C to prove everything required by that act to make the bond obligatory. *Arrington v. Culpepper*, 297.

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EVIDENCE—*Continued.*

9. Evidence to prove that the person under whom the defendant claimed was entry-taker at the time he made his entry, and that he did not make his entry in the manner directed by the act of 1777, ch. 1 (which declares the entry void unless made as the act directs), is inadmissible, upon the trial of an action of ejectment. *Tyrrell v. Mooney*, 401.

10. Although, if the case were "*res integra*," the Court might give a different opinion, the construction which was early given to the act of 1777, ch. 1, not to vacate grants by parol evidence in actions of ejectment, ought not now to be departed from. *Ibid.*

11. In many cases, although a statute declares an act *void*, the courts will construe it to mean that the act is only voidable. *Ibid.*

12. It is of more consequence that the rules of property should be fixed and notorious than that they should conform to the principles of justice. *Ibid.*

13. In *assumpsit* for goods sold and delivered by plaintiff's testator, a specific legatee, not entitled to any share of the residuum, is a competent witness to prove the delivery of the goods, unless there be a *reasonable* probability that his specific legacy must be resorted to for the payment of debts; for without this reasonable probability his interest is too remote to go to his competency. *Learey v. Littlejohn*, 406.

14. Upon the trial of issues of fact in a suit in equity, a motion to read in evidence in his behalf defendant's answer, which had been replied to and its allegations disproved by more than one witness, was disallowed. *Cartwright v. Godfrey*, 422.

15. It is no objection to the competency of a witness that he is counsel for the plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money. *Slocum v. Newby*, 423.

16. In an action of trover for a negro slave, the plaintiff offered in evidence a certified copy from the registry, of the bill of sale for the slave, he first making an affidavit that the bill of sale was not in his possession or power; that he had delivered it to the register to be registered, and on application for it afterwards was told by the register that it was lost. There was a subscribing witness to the bill of sale who resided in the State, and he was not produced as a witness: *Held*, that the copy should not be received in evidence: (1) on account of the insufficiency of the proof as to the loss of the original; (2) because the act of 1792, ch. 6, requires that in all trials where the title of a slave is evidenced by a written transfer, the execution of such writing shall be proved by the subscribing witness, if alive and within the State; and there cannot be less reason for requiring the subscribing witness, where a copy is offered in evidence, than where the original is offered. *Carlton v. Bloodworth*, 424.

17. A having sold a slave to B, and given to B a written instrument, setting forth "that for the consideration of $300 he had

EVIDENCE—*Continued.*

sold the slave to B, and that he would warrant and defend the slave against the claims of all persons," but setting forth nothing as to the soundness of the slave; B shall not be permitted to set up a parol warranty of soundness, and recover on it against A, for this would be to add by *parol* to a written instrument. The parties, by making a written memorial of their transaction, implicitly agree that in the event of any future misunderstanding, that writing shall be referred to as the proof of their act and intention; that such obligations as arise from it by just construction or legal intendment shall be valid and compulsory on them, but that they do not subject themselves to any stipulation not set forth in the writing. For if they meant to be bound by any such, they might have added them to the writing, and thus have given to them a clearness, a force and a direction which they could not have by being trusted to the memory of a witness. Where anything forming part of the contract is left out of the writing by fraud or accident, or anything forming no part of the contract is inserted by fraud, parol evidence may be received to prove these facts. But where nothing is omitted or inserted in the writing by fraud, accident or mistake, parol evidence shall not be received to show that the agreement of the parties was otherwise than the writing sets forth. *Smith v. Williams*, 426.

18. Bill to redeem. Complainant charged that he borrowed $800 of defendant, and to secure the repayment thereof had executed to defendant an absolute deed for certain lands; that it was agreed between him and the defendant that he might redeem the lands, and that defendant, upon receiving his money with interest, should reconvey them; but it was agreed that this part of their contract should not be put in writing, and that, *as to it*, complainant should trust *to the defendant's word*. Defendant, in his answer, denied the parol agreement charged in the bill, and set up an absolute purchase of the lands: *Held*, that parol evidence cannot be received to prove the agreement charged in the bill; for such evidence would contradict the deed of complainant. *Streator v. Jones*, 449.

EXECUTION.

1. Motion to stop money *in transitu*, which has been paid into the office upon an execution at the instance of B, and to apply the money to the discharge of a judgment against C, is not allowed of course, and will not be allowed unless good cause be shown. *Overton v. Hill*, 47.

2. A and B having obtained judgments before a justice of the peace, sued out executions, which were levied upon the lands of the defendant; and the executions so levied were returned into the County Court for orders of sale. The executions were levied on different days, but the orders of sale were made at the same term of the court, and writs of *venditioni exponas* were issued thereon. At the same term C obtained a judgment in court against the defendant and sued out a *fieri facias*, which was levied upon the same lands; and the sheriff sold the lands under all these executions, and paid the money into court; and it being insufficient to discharge all the exe-

EXECUTION—*Continued.*

cutions, application was made to the court for an order of distribution. The execution from the justice which was *first levied* is to be first satisfied, and the money is to be distributed according to the priority of the levy of the executions. *Lash v. Gibson*, 266.

See Practice, 13.

FERRIES. See Roads.

FORCIBLE ENTRY AND DETAINER.

In an inquisition of forcible detainer, the proceeding being of a civil nature, the court will grant a new trial if the jury find contrary to evidence. *Adam v. Robeson*, 392.

FRAUD.

The decision of the judges at a horse race may be set aside for error or fraud. *Moore v. Simpson*, 33.

FRAUDULENT CONVEYANCES.

1. Pending an execution against A, he conveys his property to B by a deed purporting to be absolute and for a valuable consideration; and it is agreed between A and B that when the execution shall be satisfied B shall reconvey the property to A. Equity will not enforce this agreement. No person is entitled to the aid of a court of equity to enforce a contract entered into with a fraudulent intention or for a fraudulent purpose. Fraudulent conveyances are binding upon the parties making them. In applying the maxim, "that he who does iniquity shall not have equity," to particular cases, it is not necessary that it should appear that the iniquity was done to the persons against whom relief is sought, although it must appear to infect the particular transaction out of which an equity is attempted to be set up. *Vick v. Flowers*, 321.

2. Pending a suit against A as security for B, A to defeat any recovery that might be made against him in said suit, conveys his property to C by an absolute deed, purporting to be for a valuable consideration, and it was agreed between A and C that C should reconvey the property to A whenever he should be requested. It appeared upon the trial of the suit against A that the debt claimed of him had been paid by B, for whom he was security, and judgment was rendered in favor of A, upon which he filed a bill to compel C to reconvey the property according to the agreement. Equity will not enforce this agreement, on account of its moral turpitude. *Jackson v. Marshall*, 323.

GENERAL ASSEMBLY, POWERS OF.

1. Section 41 of the Constitution declares "that schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged and promoted in one or more universities." In obedience to this injunction of the Constitution, the Legislature established an university, and in the year 1789 granted to the trustees thereof "all the

GENERAL ASSEMBLY, POWERS OF—*Continued.*

property that had theretofore or should thereafter escheat to the State." In the year 1800 the Legislature repealed this grant: *Held*, that this repealing act is void, (1) it being in violation of that section of the Constitution which directs the General Assembly to establish an university. When established, it is the university of the people, and not of the General Assembly, who are the mere agents of the people in doing the act. When endowed, its funds are beyond the control of the General Assembly; otherwise, as it cannot exist without funds, the General Assembly might destroy it. (2) It being in violation of the fundamental principles which protect private rights. (3) It being in violation of section 10 of the Bill of Rights, which is a part of the Constitution, and which declares "that no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." The word "liberties" in this section signifies the privileges and rights which corporations have by virtue of the instruments which incorporate them; and is here used in contradistinction to the word "liberty," which refers to the personal liberty of the citizens. The section intended to secure to corporations as well as to individuals the rights therein enumerated. The words "law of the land" mean "the lawful proceedings of the *proper tribunals* of the country." And the entire section means "that neither corporations nor individuals shall be deprived of their liberties or property, unless by a trial in a court of justice, according to the known and established rules of proceeding derived from the common law, and such acts of the Legislature as are consistent with the Constitution." *University v. Foy*, 58.

2. Escheated lands vested in the State without an inquisition or office found; and the act of 1789 conveyed these lands to the Trustees of the University. The clause of the Constitution which declares that "all commissions and grants shall run in the name of the State of North Carolina, and bear teste and be signed by the Governor," does not restrain the Legislature from conveying lands by a solemn act of their body without grant. *Ibid.*

GRANTS.

1. A court of law will receive parol evidence to show that the officers of State have issued a grant for lands forbidden by law to be entered and granted, and will take notice that such grant is void and that nothing passes by it. *Strother v. Cathey*, 162.

2. Where a grant has issued irregularly, the party wishing to avoid it must apply to a court of equity. *Ibid.*

3. The act of 1783, ch. 2, forbids entries or surveys to be made of certain lands set apart for the Cherokee tribe of Indians. In 1791 this tribe, in a treaty made with the General Government, "relinquish, release and cede these lands." The right of the Indian tribes to lands is regarded by the European and American governments as a mere pos-

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GRANTS—*Continued.*

sessory right; and the cession of this right by the Cherokee tribe vested the right in North Carolina, and the United States were the agents of North Carolina for that purpose. *Ibid.*

GUARDIAN.

1. Under the act of 1762, ch. 5, the County Court is not bound to appoint as guardian the next of kin or the person chosen by a minor above fourteen years of age; but may and ought to appoint that person who, in their discretion, they believe will best execute the duties of the appointment. *Wynne v. Always*, 38.

2. The choosing of a guardian by orphans in court does not necessarily destroy the authority of a former guardian. The court can at any time remove a guardian upon proper cause shown, and in the appointment of a successor have entire discretion. *Bray v. Brumsey*, 227.

3. The County Court is not bound to confirm the choice of a guardian made by an infant of fourteen years of age and upwards. Under the act of 1762, ch. 5, the court may exercise a discretion in appointing a guardian, independent of any choice which the infant may make. *Grant v. Whitaker*, 231.

HEIRS AND DEVISEES.

Judgment of execution against the real estate of a deceased debtor in the hands of the heirs and devisees, reversed, because it was not found that the executrix "had fully administered, had no assets, or not sufficient to satisfy the creditors' demand." *Caldwell v. Brodie*, 97.

HORSE RACING.

1. In articles of agreement to run a horse race, signed and sealed by the parties, where the weight to be carried by each horse is mentioned, the riders must be weighed after they come through the poles; and parol testimony is not admissible to prove that the parties agreed not to weigh out. *Critcher v. Pannell*, 32.

2. By the articles the nags were to be turned thirty feet from the starting poles, and to be run *the first time they were locked.* If the conduct of the other party be fair, the party claiming the stakes must show that the nags were locked after being turned to run. *Ibid.*

3. The opinion of judges chosen by the parties to a race is not conclusive; and if they be either mistaken or corrupt, their opinion ought to be set aside and the justice of the case disclosed by other testimony. *Moore v. Simpson*, 33.

4. In all racing contracts it is incumbent on the plaintiff to bring his case within both sections of the act of 1800, ch. 21. *Moore v. Parker*, 37.

INDICTMENT.

1. Indictment for perjury. Perjury may be committed in answering a question that has no relation to the issue, if asked with

INDICTMENT—*Continued.*

a design to impair the credit of the witness as to those parts of the case which are material and important to the issue, particularly if the witness be cautioned as to his answer. For, if it appear plainly that the scope of the question was to sift the witness as to his knowledge of the substance, by examining him, strictly concerning the circumstances, which afterwards appear to be false, he may be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence than his proving to have an exact and particular knowledge of all the circumstances relating to it. *S. v. Strat*, 124.

2. Indictment contains two counts: one for a mayhem under the statute, and charges the defendant with aiding and abetting the mayhem; the other for an assault and battery. Defendant acquitted upon the first count and convicted upon the second. Judgment cannot be rendered against defendant upon this conviction. *S. v. Bridges*, 134.

3. In an indictment for perjury the style of the court before which the perjury is alleged to have been committed must be legally set forth; therefore, where the indictment charged that the false oath was taken "at a certain *Superior Court* begun and held for the District of Hillsborough," the judgment was arrested. *S. v. Street*, 156.

4. Motion to quash an indictment. In cases of doubt, the court will not quash an indictment. It is due to the State and to the rights of the citizen, in such cases, to have the facts inquired into by a jury, and if the facts charged be affirmed by their verdict the defendant can have the same advantage of legal points upon a motion in arrest as upon a motion to quash. Therefore, the court refused to quash an indictment which charged "that the defendant, fraudulently intending to injure A. B., unlawfully and fraudulently procured a certificate of a survey on an entry of lands in the entry-taker's office of Brunswick County to be made by C. D., the surveyor of said county; which certificate set forth that the lands described therein had been surveyed, and that H. and G. were chain-carriers, when, in fact and in truth, the lands described in the certificate were not surveyed, and when, etc., H. and G. were not chain-carriers." *S. v. Smith*, 213.

5 Profane swearing, independent of the disturbance and injury which it may produce to those who hear it, is not indictable; it is cognizable before a justice of the peace, under the act of 1741, ch. 14; but where it is charged as a nuisance, and there is evidence to support the charge, it is indictable. Therefore, a motion to arrest the judgment, upon an indictment which charged "that the defendant swore several oaths in the courtyard during the sitting of the court, to the great disturbance and common nuisance of the citizens necessarily attending said court," was overruled. *S. v. Kirby*, 254.

6. The statute does not entitle the State to an appeal in a criminal prosecution upon a verdict of acquittal. *S. v. Jones*, 257.

7. A witness for the State who is called out upon his recognizance, and has judgment *nisi* for the forfeiture entered

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INDICTMENT—*Continued.*

against him, may apply to the court for a remission of the forfeiture before a *scire facias* issues against him. *S. v. Herndon*, 269.

8. An accessory is not liable to be tried, as for a misdemeanor, where the principal is amenable to justice. The act of 1797, ch. 19, does not infringe this rule. That act only extends to cases "where the principal escapes and eludes the process of the law." *S. v. Groff*, 270.

9. The caption of an indictment must describe the court before which it is found, that it may appear the court can exercise jurisdiction over the offense charged. *S. v. Sutton*, 281.

10. Solicitor for the State is entitled to a fee in case of a *scire facias* against a delinquent juror in all cases where costs are given against such juror. *S. v. Whitsenhunt*, 287.

11. The prosecuting officer for the State has a discretionary power to indorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it. *S. v. English*, 435.

12. The Superior Court of one county has no jurisdiction of criminal offenses committed in another county, although both of the counties belonged to the *same judicial district* before the act of 1806, ch. 2. *S. v. Patterson*, 443.

13. In an indictment for murder, where the death is occasioned by a wound, bruise, or other assault, *the stroke* must be *expressly laid*. But an indictment charging "that A. B., with a certain stick, etc., in and upon the head and face of C. D. then and there feloniously, etc., did strike and beat, *giving* to the said C. D. *then and there*, with the stick aforesaid, in and upon the head and face of the said C. D. several *mortal wounds*, of which said several mortal wounds the said C. D. instantly died," is good, for there is in the first clause a direct allegation of a stroke, and the participle *giving* and the words *then and there* connect this allegation with the mortal wounds in the second clause. In an indictment charging "that A, feloniously and of his malice aforethought, assaulted B, and with a sword, etc., *then and there* struck him," etc., the first allegation, of *feloniously and of his malice aforethought*, applied to the assault, runs also to the stroke to which it is essential. Where in an indictment for murder the death is charged to be occasioned by a *wound*, a description of the wound must be set forth in the indictment; its length, breadth, depth, etc., where they are capable of description; and the omission of such description is fatal to the indictment. Where the death is charged to be occasioned by *a bruise*, a description of its dimensions, etc., is not necessary. *S. v. Owen*, 452.

INDIANS. See Grants.

1. The right of the Indian tribes to lands is regarded by the European and American governments as a mere possessory right. *Strother v. Cathey*, 162.

INDIANS—*Continued.*

2. The government of the United States as well as the governments of the several States have claimed and respected in each other the claim to exclusive jurisdiction and title to territory occupied by the Indian tribes. *Ibid.*

3. The treaty, therefore, of 1791, with the Cherokees, cannot be considered as conveying *a title to the soil* of any part of this State to the United States. It can only be received as a relinquishment of that possessory right which alone had been yielded to the Indians. This right did, of course, vest according to the precedent claims of North Carolina, known and admitted by the United States. The treaty was made by the United States, because by the Federal Constitution the General Government had been made the agent of North Carolina for that purpose. *Ibid.*

4. The grounds on which entries of lands acquired since 1777, from the Cherokees, are considered to be valid, explained by *Locke, Judge.* *Ibid.*

INFANTS. See Equity, 22.

INJUNCTION.

Where a bill was filed to enjoin a judgment of the County Court in a cause in which equity jurisdiction had been conferred upon it by act of Assembly, it was dismissed because the County Court had jurisdiction of the question, and there was no allegation of fraud, surprise or mistake. *Holding v. Holding*, 9.

INSOLVENT DEBTORS. See Creditor and Debtor.

An action cannot be maintained upon a bond given by a person arrested upon a *ca. sa.* to keep within the limits of the rules of the prison; for the act of 1759, ch. 14, gives to such bond the *force of a judgment*, and authorizes the creditor to have execution thereon, upon motion in court. *Brown v. Frazier*, 421.

JUDGMENT.

In a suit against an administrator a plea of judgment confessed since last continuance is bad on demurrer. *Churchill v. Comron*, 39.

JURISDICTION OF COUNTY COURT.

Where a bill was filed to enjoin a judgment of the County Court in a cause in which equity jurisdiction had been conferred upon it by act of Assembly, it was dismissed because the County Court had jurisdiction of the question, and there was no allegation of fraud, surprise or mistake. *Holding v. Holding*, 9.

JURISDICTION OF SUPERIOR COURTS. See Indictment, 12.

LEGACIES.

Testator directs his debts to be paid out of his personal estate; charges his real estate with the maintenance of his wife;

LEGACIES—*Continued.*

gives £1,000 to an only daughter; and after giving other pecuniary legacies he gives the remainder of his estate to his three sisters. The personal estate is exhausted in the payment of debts: *Held*, that the legacy of £1,000 to the daughter is a charge upon the real estate. *Givins v. Givins*, 192.

LIMITATION OF ESTATES.

A gift of a chattel to a person, with a reservation of a life estate therein to the donor, is good, and vests a property in the donee, because the reservation, being inconsistent with the estate created by the gift, is void. *Duncan v. Self*, 466.

LIMITATIONS, STATUTE OF.

1. Seven years' possession without color of title is no bar to the right of entry. *Stanley v. Turner*, 14.

2. Reasons on which this construction of the third and fourth sections of the act of 1715, ch. 27, is founded. *21 to 30 in note.*

3. Inconvenience resulting from this construction. *30 to 32 in note.*

4. Neither the act of 1800, repealing the law granting escheated lands to the Trustees of the University, nor bringing a suit by the escheator under the act of 1801 suspends the statute of limitations as to the trustees, whose right was sought to be divested by those acts. *University v. Campbell*, 185.

5. Act of 1715, ch. 48, barring the claims of creditors against the estates of deceased debtors. A demised lands to B and B covenanted in the indenture of demise to pay $50 annually for the rent. The demise was made in 1790, and B died in 1794, having had possession of the premises until his death. The demise expired in 1803, no rent having been paid. A sued the executor of B upon the covenant of the indenture, for the rents; the suit was brought in 1804, and the executors pleaded the act of 1815, ch. 48, in bar. Plea sustained, for the defendants are not sued upon their own possession, but upon the possession of their testator, upon his pernancy of the profits of the demised premises, and not their own; and they must answer as his representatives. The act bars after seven years from the death of the testator, although great part of the rent *did not become due* until more than seven years after his death; no notice of the debt having been given to the executors within the seven years. *Neil v. Hosmer*, 202.

6. Color of title. A devise is color of title, and seven years' possession under it bars the right of entry. *Evans v. Satterfield*, 413.

7. A constructive possession of lands under color of title, for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the statute. *Clinton v. Herring*, 414.

8. Nor will the actual possession, for twenty-one years, of different parts of the lands covered by the color of title, by purchasers from him to whom the color was made, avail him as

LIMITATIONS, STATUTE OF—*Continued.*

to the parts of the lands not sold and actually possessed; for they are distinct tracts held by different persons in different rights. *Ibid.*

MORTGAGE.

1. A creditor agrees with his debtor, after judgment, to levy his execution on the whole of the debtor's property, and purchase it in at the sale and hold it as a security for his debt; equity will permit the debtor to redeem the property. *Wilcox v. Morris*, 116.

2. It is a general rule that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered in equity as a mortgage, and the estate redeemable, even though there be an express agreement of the parties that it shall not be redeemable, or that the right of redemption shall be confined to a particular time or to a particular description of persons. In applying this rule to particular cases, a court of equity will often ascertain the fact whether the conveyance was intended as a security for money, however absolute it may appear; and will lay hold of all the circumstances of the transaction to ascertain this fact, such as the value of the estate conveyed and the sum given therefor, the bargainee not being let into the immediate possession of the estate, his accounting for the rents and profits to the bargainor, etc. *Critcher v. Walker*, 488.

3. Circumstances which incline the Court to construe a transaction to be a *conditional sale* and not a mortgage. Among others: (1) The money advanced being equal, or nearly so, to the value of the goods conveyed. (2) A stipulation in the contract of the parties that he who advances the money and receives the goods shall hold the goods subject to the claim of him from whom he received them until a particular day, and subject to his loss if they be destroyed by that day; but to hold them free from such claim after the day, and subject to his own loss if they be destroyed or perish after that day. *Ibid.*

4. In mortgages the want of a covenant for the repayment of the mortgage money is no bar to a redemption; nor in such case is the mortgagee without remedy, although the goods be destroyed or not of value sufficient to pay the debt. In equity he may recover the money from the mortgagor, for every mortgage implies a loan and every loan a debt. *Ibid.*

NEW TRIAL.

1. In an ejectment the Court ordered a second new trial because the verdict was contrary to evidence. *Comrs. v. James*, 40.

2. The court will not grant a new trial upon the affidavit of one of the jurors, that he did not assent to the verdict. *Suttrell v. Dry*, 94.

3. Facts known to a party before trial, but omitted to be proved, upon a belief that the evidence offered was sufficient, no good ground for a new trial. *Person v. Davey*, 115.

NOTICE.

1. The principle that notice to an agent is notice to his principal does not apply to the case of surveys of entries of land made by public surveyors in the discharge of their public duties. *Merrit v. Sloan*, 121.

2. The principle applies only to cases where there is a special trust or confidence reposed in the agent *at* the time of the transaction, or *after it*, by the acceptance of the purchase by the principal. *Ibid.*

3. Entry-taker's books no notice of an entry having been made. *Ibid.*

4. If a scrivener or attorney who draws a mortgage to secure the payment of money has notice of a prior mortgage, this is constructive notice to the last mortgagee. *Ibid.*

5. Where a father, having notice that lands are contracted to be sold, purchases the lands and takes a deed to his son and his heirs, the son, being a volunteer, is a trustee of the legal estate for the first purchaser. *Ibid.*

PARTITION, BRINGING INTO HOTCHPOT.

1. In making partition so much of the ancestor's lands acquired by him after making his will as are conveyed to a child by way of advancement are to be valued at the time of the conveyance, and the residue of the lands to be valued at the time of the ancestor's death. *Toomer v. Toomer*, 93.

2. What shall dissolve a tenancy in common. A and B, being tenants in common of a tract of land situate in an island in the Cape Fear River, agree by deed, "that as to those lands on the said island which lie below the causeway or great road through the island, A's two-thirds shall be taken all together, and shall begin at the lower end of the said island, and be bounded by the Northwest River on the one side and by the Northeast River and Great Creek on the other; and B's one-third shall be taken off of the remainder, lying above the said A's and below the said causeway; and as to all that part of the island belonging to them, lying above the said causeway, A's two-thirds shall be taken next the thoroughfare and Northeast River, and the said B's one-third shall be taken next the causeway." This agreement is sufficiently certain for each tenant to know his share, and dissolves the tenancy in common. *Moore v. Eagles*, 302.

PENALTY, PENAL BONDS.

1. The act of 1794, ch. 2, declares "that every person who shall knowingly sell, buy or hire a slave imported into this State by land or water, contrary to the provisions of that act, shall forfeit and pay the sum of one hundred pounds." A, having purchased a slave, not knowing at the time of the purchase that he had been imported contrary to the provisions of the act, sold the slave to B, knowing before this sale of the illegal importation. This sale does not subject him to the penalty. *Governor v. Howard*, 168.

2. In a suit upon a penal bond the plaintiff is not entitled to recover beyond the penalty. *Warden v. Nielson*, 275.

See Repeal of Penal Statutes.

PENALTY, PENAL BONDS—*Continued.*

3. The act of 1808, ch. 12, sec. 3, declares the appointment of deputy clerk of the County Court to be incompatible with the office of a justice of the peace; and further declares "that if, after the passing of the act, any person holding the office of justice of the peace shall *accept* the appointment of deputy clerk, his office as a justice of the peace shall be vacated; and if, being deputy clerk, *he accept* the office of justice of the peace, his appointment as deputy clerk shall be vacated; and if any person shall presume to act in any of the said offices contrary to the true intent and meaning of the act he shall forfeit and pay the sum of fifty pounds." This act does not extend to the case of a man who was both deputy clerk and justice of the peace *before* the passing of the act, and who subsequently continued to act as a justice of the peace, without resigning his appointment as deputy clerk. *Wardens v. Sneed*, 485.

PERJURY. See Indictment.

PLEAS AND PLEADING.

1. To an action against an administrator, he pleaded, "fully administered, generally and specially, *no assets but to the amount of £120, which are liable to a suit, Slade and Jocelyn against defendant.*" At the next term he pleaded as a plea since the last continuance, "*a judgment confessed in favor of Slade and Jocelyn, and other judgments.*" To this plea the plaintiff demurred generally. Demurrer sustained and plea overruled. *Churchill v. Comron*, 39.

See Abatement.

2. To the plea of set-off there may be a double replication; for the set-off is in the nature of a cross action, and the person pleading it is to be considered (so far as respects this plea) in the light of a plaintiff, and bound to produce the same testimony to support it that would be required to enable him to recover in that character; and the plaintiff against whom the set-off is pleaded ought to be permitted, by way of replication, to make the same defense which the law would permit him to enter by way of plea had he been originally sued. *Holding v. Smith*, 154.

3. Debt to recover £100, the penalty imposed by the act of 1794, ch. 2, for importing a negro slave into this State. The writ called upon the defendant to answer "James Turner, Governor, etc., of a plea that he render to him £100," etc. The declaration stated, "Benjamin Forsyth, who sues in this behalf, as well for his excellency James Turner, now Governor of the State, etc., as for himself, complains of William Horton, etc., that he render to James Turner, now Governor, etc., and the said Benjamin, who sues as aforesaid, £100," etc. Variance between the writ and declaration pleaded in abatement. Plea sustained. *Governor v. Horton*, 212.

4. Judgment *quando acciderint* was rendered against an administrator for £1,835 4s. 2d., to be discharged by the payment of £917 12s. 1d. Plaintiff sued out a *scire facias*, suggesting

PLEAS AND PLEADING—*Continued.*

assets, and reciting a judgment for £917 12s. 1d.; but not reciting it as a judgment *quando*, etc. *Nul tiel record* and *no assets* were pleaded to the *sci. fa.* The court sustained the plea of *nul tiel record*, and gave judgment for the defendant. Plaintiff moved to set this judgment aside, and for leave to amend his writ of *sci. fa.* The judgment was set aside, and leave given to amend on payment of costs. *Tear v. White*, 412.

POSSESSION, ADVERSE. See Deeds.

Part of the lands to which defendant set up claim was included within his fence, and he was in the actual adverse possession thereof at the time of the conveyance to the lessors of the plaintiff. The plaintiff is not entitled to judgment for the lands lying within the defendant's fence. *Dennis v. Fan*, 138.

POWERS OF ATTORNEY.

1. A power of attorney executed in 1772 in Ireland, to sell lands in this State, and proved before the mayor of the city of Carrickfergus in 1774, and the probate certified under the seal of the mayoralty, is not admissible in evidence, as there was no law before 1793 for the probate and registration of such powers of attorney. *Benzien v. Lenoir*, 194.

2. And this defect is not cured by a registration of the power of attorney under the private act of 1782, ch. 36, sec. 3, which directs, "that this power of attorney shall be admitted *to probate and registration* in the county of Wilkes, and be as good and valid as if the confiscation acts had never passed," for by this act a *further probate* as well as registration were necessary to give validity to the power of attorney. *Ibid.*

3. There being no law before 1793 for the probate and registration of powers of attorney to sell lands, a power of attorney proved before a judge of our Superior Courts in 1779, and registered upon his certificate of probate, is not admissible in evidence. *Ibid.*

PRACTICE.

1. Upon the suggestion of the defendant's death, his administrator ought to be made a party by a *scire facias;* and an order "that the administrator be made a defendant, unless he show cause," being served upon the administrator, he appeared and showed for cause that the order was irregular and improper, whereupon the rule for making him a party was discharged. *Mallison v. Howard*, 44.

2. A, being the administrator of B, was summoned as a garnishee in a case pending in the County Court. He was examined, and an issue was made up and found against him. He prayed an appeal, but did not give bond for the prosecution thereof until the next term, in consequence of which the appeal was dismissed. A writ of *certiorari* will lie to remove the case to the Superior Court. *Fryer v. Blackmore*, 94.

See Abatement.

PRACTICE—*Continued.*

3. Rule for a new trial entered *nunc pro tunc*, the clerk having omitted to enter it at the proper time. *Howard v. Person*, 100.

See Wills.

4. On the abatement of a suit by the death of the plaintiff, execution ought not to be issued for the costs until a *scire facias* has issued to the representatives of the plaintiff. *Simmons v. Ratcliff*, 113.

5. Plaintiff having lost the bond declared on, after an appeal from the judgment of the County Court, is permitted to prove the contents thereof upon the trial in the Superior Court, and to recover judgment without amending his declaration. *King v. Bryant*, 131.

6. The judgment of the County Court not being lessened in the Superior Court, bears 10 per cent interest up to the time of rendering judgment in the Superior Court. *Mumford v. Hodges*, 131.

7. The sum levied upon an execution being insufficient to discharge the plaintiff's judgment, must be applied solely to his use; and the costs of the defendant's witnesses are not to be paid out of the sum thus levied. *Pearson v. Haden*, 140.

8. The return of *two nihils* good service of a *scire facias* against bail. *Woodfork v. Bromfield*, 187.

9. Motion to file a new declaration in ejectment, the original being lost out of the office, and the defendant served with notice to produce a copy, disallowed. *Cleveland v. Grime*, 268.

10. A witness for the State is called out upon his recognizance, and the judgment of the court for the forfeiture is entered against him, *nisi*. He may apply to the court for a remission of the forfeiture before a *scire facias* issues against him. *S. v. Herndon*, 269.

11. After verdict, the court will not arrest the judgment because the writ is *tested* by the clerk and *signed* by the deputy clerk. The Stat. 5 Geo. I., ch. 13, is in force, and cures defects in the writ by verdict. *Dudley v. Carmolt*, 330.

12. Section 25 of the Constitution is intended merely to prescribe an uniform mode of issuing writs. *Ibid.*

13. An order entered of record for a *scire facias* to issue to make the representatives of a deceased defendant a party to a suit will prevent an abatement of the suit. *Hamilton v. Jones*, 441.

14. A, having recovered a judgment against B, sued out a *fi. fa.*, and before the return of it he died. *After* his death, he having no representative, another *fi. fa.* was sued out in his name. This *fi. fa.* was set aside as having issued erroneously. *Gibson v. Lynch*, 495.

PRACTICE—*Continued.*

15. A, having recovered a judgment against B in the County Court, B prayed an appeal to the Superior Court, which was granted, upon his entering into bond with *one* security only. On motion of A, in the Superior Court, the appeal was dismissed, for the act of 1777, ch. 2, is peremptory in requiring two securities. And the motion to dismiss prevailed after the record had been in the Superior Court three years, and sundry orders made in it. *Ibid.*

16. In a suit against an administrator a plea of judgment confessed since last continuance is bad on demurrer. *Churchill v. Comron*, 39.

PROCESS.

1. The return of *two nihils* is good service of a *scire facias* against bail. *Woodfork v. Bromfield*, 187.

2. Defects in warrants must be pleaded in abatement; they cannot be taken advantage of after verdict upon motion to arrest the judgment. *McCrea v. Starr*, 252.

See Practice, 11, 13.

PROMISSORY NOTES, BILLS OF EXCHANGE.

An executor or administrator may assign the securities of his testator or intestate, without naming himself executor or administrator. *Neil v. New Bern*, 133.

REHEARING.

A second rehearing will be granted to reverse the judgment upon the first rehearing, if justice demands it. *Wilcox v. Wilkinson*, 11.

REPEAL OF PENAL STATUTES.

1. The repeal of an act of Assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. *Governor v. Howard*, 465.

2. A sues B for the forfeiture of £100, given by the act of 1794, for buying a slave knowing him to have been imported contrary to that act. Pending the suit the act is repealed, and the repeal is pleaded in bar. The plaintiff demurs to the plea. The demurrer overruled and the plea sustained. *Ibid.*

ROADS AND FERRIES.

1. The County Court rejected a petition for an order to lay out a public road; the petitioner appealed to the Superior Court. The appeal cannot be sustained. *Hawkins v. Randolph*, 118.

2. By the act of 1784, ch. 14, the power and authority to lay out public roads is vested in the county courts: they are to judge *where* roads shall run, *when* or *how* changed or discontinued. When they have exercised this power, and declared a public road shall be laid out, a jury shall be summoned to lay it out to the greatest advantage of the inhabitants, and to assess damages to persons who may be injured by such road going

ROADS AND FERRIES—*Continued.*

through their lands. No judicial authority is vested in the jury with regard to the propriety or impropriety of such road; that power rests with the court, and, when once exercised, the jury are bound to carry their order into effect. *Ibid.*

3. The party praying for an order to have a road laid out cannot, under the act of 1784, ch. 14, have the case examined in the Superior Court. For (1) the laying out of roads was considered to be a matter of mere county police; (2) an appeal will not lie, because there are no parties to the proceedings—no defendant or defendants to whom an appeal bond could be given or against whom judgment could be given for costs. *Ibid.*

4. The General Assembly having authorized the county courts of Camden and Pasquotank to appoint commissioners to lay out a road, and having authorized John Hamilton to erect toll-gates on the said road and exact toll, the commissioners laid out the road across the lands of Enoch Sawyer; and their report being returned to court, was set aside on the ground that Sawyer had no notice. *Sawyer v. Hamilton*, 253.

5. The County Court may grant to a man the privilege of erecting and keeping a ferry, although he do not own the lands on either side of the river or creek over which the ferry is established. *Raynor v. Dowdy*, 279.

SET-OFF. See Pleas and Pleading.

Debts which can be set-off must be such as are due in the same right; therefore, where A gave his note to B, *administrator of the estate of C*, and B assigned the note to D, who sued A, A was not permitted to set-off a note given by B to E, and by him assigned to A, nor a note given by B to him. *Roberts v. Jones*, 353.

SHERIFFS, SHERIFFS' SALES, SUMMARY REMEDY AGAINST.

1. A sheriff cannot purchase property at his own sale; if he bid off property, the bidding is void. Nor can a sheriff sell at private sale property levied on by him by virtue of an execution. *Ormond v. Faircloth*, 35.

2. A sheriff is not *finable* who returns his execution within the time prescribed by law, but fails to return the money made thereon into court, or to pay it to the party or his attorney. *Davis v. Lancaster*, 255.

3. It is not incumbent on a purchaser of lands sold for taxes acknowledged to be due, to show, on the trial of an ejectment brought against him by the person who was bound to pay the taxes, anything more by way of defense than the sheriff's deed for the lands so sold. If such purchaser be plaintiff in the ejectment, he must also show that the title to the lands is out of the State. The title being out of the State, the taxes are *a lien* upon the lands, into whosesoever hands they may pass; and it behooves the present holder of the lands to see that the taxes have been paid; for if the sheriff, in his advertisement of sale for the taxes, mistake the name of the owner of the lands, or their local situation,

XUM

SHERIFFS, SHERIFFS' SALES, SUMMARY REMEDY AGAINST—*Continued.*

the purchaser at such sale shall hold the lands. The acts which make it the duty of the sheriff to advertise the sale in some newspaper printed in the State and at three public places in the county, and set forth the names of the owners of the lands, the water courses on which the lands are situate, etc., are merely directory to the sheriff in the discharge of his duty. His neglect to observe these directions may subject him to a suit for damages at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the sheriff. The sheriff's authority to sell rests upon the fact *that the taxes have not been paid.* If, therefore, it appear that the taxes have been paid, the purchaser at the sheriff's sale gets nothing by his purchase. *Martin v. Lucey,* 311.

4. The summary remedy against delinquent sheriffs, given by the act of 1808, ch. 21, applies as well to cases where the delinquent is out of office as where he is not; and also applies to arrearages due by the delinquent previous to the passing of the act, which act is a beneficial one, and is to be construed liberally. *Oats v. Darden,* 500.

TAXES.

A billiard table erected and used merely for the purpose of amusement is liable to the tax imposed on "billiard tables," in the same way as if used for the purposes of gaming. *Sears v. West,* 291.

TRESPASS.

To an action of trespass for an assault and battery, brought against six defendants, they having employed different counsel and severed in their defense, pleaded *not guilty* severally. The issues were all submitted to the jury at the same time, and four of the defendants were found *guilty* and two *not guilty.* The defendants found not guilty are entitled to their costs severally, including each an attorney's fee. *Stockstill v. Shuford,* 39.

TROVER.

A bequeathed negroes and other personal property to his wife during her life, and after her death to be sold and equally divided among his children. After her death, B converts the property to his own use. The executors of A can bring trover for this conversion. *Allen v. Watson,* 189.

VENDOR.

The vendor of goods is liable for affirming the goods to possess a quality which would increase their value, if it turn out that the goods do not possess this quality, although the vendor did not know that the affirmation was false. *Thompson v. Tate,* 97.

VERDICT.

The number of times the verdict shall be set aside and a new trial granted is in the discretion of the trial court. *Comrs. v. James,* 40.

INDEX.

WARRANTY.

1. An express warranty excludes an implied one. *Lanier v. Auld*, 138.

2. In the contract of sale the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title, where the vendor is in possession at the time of the sale. *Ibid.*

3. The words in an instrument of writing that "A had sold to B a negro man by the name of Jim, and that he doth warrant the *aforesaid slave* to be sound and healthy, and not above twenty-five years of age," do not amount to a warranty that the negro is a slave. The word "slave" is merely descriptive of the person to whom the warranty of soundness, etc., is to be applied. *Ibid.*

4. The express warranty as to soundness and age excludes any implied warranty as to other qualities. The law will not imply what is not expressed, where there is a formal contract. *Ibid.*

WILLS, PROBATE OF; REVOCATION OF.

1. The probate of a will may be set aside after the term expires at which the will was proved, and a second probate be ordered by the same court; and upon an application for a re-probate the court will look to all the circumstances of the case to aid its discretion in allowing or rejecting the application. *Dickenson v. Stewart*, 99.

See Evidence.

2. The testator signs his will and it is attested in his presence by one witness. He then inserts *the date* and the words *dearly beloved*, and has it attested in his presence by another witness; and then he acknowledges the execution of the will in presence of both witnesses. This is a good execution of the will to pass the real as well as personal estates of the testator. *Bateman v. Mariner*, 176.

3. As the statutes of devises, 32 and 34 Henry VIII., declare that "*a man having* lands may devise them," lands acquired subsequent to the devise do not pass by it, although the devisor expressly refers to *all the lands he might have at his death*; for at the time of the devise he *had not* the lands. *Jiggitts v. Maney*, 258.

4. Yet if the testator had no estate in the lands at the time of the devise, and he devise them for the payment of debts, or afterwards acquires them, a court of equity will decree a sale of them. *Ibid.*

5. Lands acquired subsequent to a devise pass by a new publication of the will. At what time a will shall be considered *as published*, under the act of October, 1784, ch. 10, sec. 5. Under this act there are two classes of cases: (1) where a will is found among the valuable papers or effects of the deceased; (2) where it has been lodged in the hands of any person for safe-keeping. In each case it is necessary, to support a devise of lands, that the will be in the handwriting of the deceased, and that his name be subscribed thereto or

WILLS, PROBATE OF; REVOCATION OF—*Continued.*

inserted in some part thereof. The act makes the circumstances of the will being in the handwriting of the deceased, with his name subscribed thereto or inserted in some part thereof, and its being found among his valuable papers or effects, or lodged in the hands of some person for safe-keeping, as equivalent to a publication before witnesses. And the publication shall be referred to *the date* of the will, not to the time of its being found among the valuable papers or effects of the deceased or of its being lodged in the hands of a person for safe-keeping. *Ibid.*

6. The probate of a will attested by only *one* witness being caveated in the County Court, an issue of "*devisavit vel non*" was made up under the direction of the court; and the jury found "that the deceased did, in the said will, devise *both real and personal* property." The caveator appealed, and in the Superior Court the jury found that the paper-writing offered as the will did devise as to the personals, but not as to real estate." The executor offering the will for probate shall pay the costs; it being his folly to insist in the County Court that the will, being attested by only one witness, could pass the real estate. *Warren v. High*, 436.

7. A had a child born after he had made and published his will, and in his last sickness inquired of the physician who attended him, and who was one of the witnesses to the will, "whether he thought him dangerous, and begged for a candid answer, for that his youngest child was unprovided for, and he wished to make some provision for the child." The physician answered "that he thought him better, and expressed a wish that he would postpone such a business to some future period." A died, and it was held that the birth of the child after the making of the will, together with the declarations of A to his physician, of his wish to make a provision for the child, did not amount to a revocation of the will. *McCay v. McCay*, 447.

8. The words of this will indicate no intention to give the executor the rents and profits for his personal benefit. *Blount v. Johnston*, 36.

WITNESSES.

1. A witness summoned in any suit is bound to attend from term to term until discharged by the court or the party at whose instance he was summoned; and may be called out and forfeit fifty pounds at every term he fails to attend after he is summoned. *Sweaney v. Hunter*, 181.

2. And after being called out, a promise made to him by the party at whose instance he is summoned, not to enforce the forfeiture if he will attend at the next term and give his evidence, is not binding, it being without any sufficient consideration. *Ibid.*

3. A witness summoned by each party in a suit is entitled to compensation from each. *Peace v. Person*, 188.

4. A witness for the State who is called out upon his recognizance, and has judgment *nisi*, for the forfeiture, entered

WITNESSES—*Continued.*

against him may apply to the court for a remission of the forfeiture before a *scire facias* issues against him. *S. v. Herndon*, 269.

WRITS OF ERROR, REVERSAL OF JUDGMENT.

1. After judgment by default and before the execution of a writ of inquiry, the defendant dies. The plaintiff executes his writ of inquiry, and final judgment is rendered in his favor. This judgment is erroneous and reversible upon a writ of error. *Colson v. Wade*, 43.

See Heirs and Devisees.

2. The plaintiff in error, upon a reversal of the judgment, is not entitled to restitution for lands sold under an execution issued upon the judgment, but to the money arising from the sale. *Bickerstaff v. Dellinger*, 272.

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